would be of no importance, since the party might as well rely upon the second injury, as the former one thereby revived, if they were precisely equivalent." So in *Robbins* v. *Robbins*, 100 Mass. 150 (1868), condonation of cruelty was extinguished by the mere fact that for a period of six weeks, the husband, though living in the same house with his wife, wholly and continuously refused to speak to her; such evidence of persistent and enduring unkindness and ill-temper, not only being itself a breach of marital duties, but also warranting the wife or the court in inferring that the husband's smothered anger might again break out into acts of positive cruelty. And see *Gardner* v. *Gardner*, 2 Gray 434. And in *Phillips* v. *Phillips*, 27 Wis. 252 (1870), it was held that the subsequent misconduct might be of a slighter nature than would have been necessary to constitute an original ground of divorce. See also *Davis* v. *Davis*, 19 Ill. 334 (1857), that condoned adultery may be revived by subsequent cruelty. Apparently, therefore, there is an entire uniformity of decisions in both countries on this subject.

EDMUND H. BENNETT.

RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

WARD v. KILPATRICK.

Three requisites constitute the criterion of a fixture: 1, actual annexation to the realty, or something appurtenant thereto; 2, application to the use or purpose to which that part of the realty to which it is connected is appropriated; 3, the intention of the party making the annexation to make a permanent accession to the freehold.

Where the owner of a house in process of construction contracted with the plaintiff for mirror frames to be set in the hall and parlor, those in the hall filling up and occupying a gap left in the wainscoting, and those in the parlor fitted into a gap purposely left in the baseboard, and both being fastened to the walls with hooks and screws, and intended by the owner to be permanently attached to the buildings, and to go with them, when sold, as essential parts of the building: *Held*, that they became part and parcel of the building itself, and, therefore, that the work done by the plaintiff was work upon the house, that the materials furnished were in its construction, and therefore that a lien attached to the building under the mechanic's lien law.

ACTION to foreclose a mechanic's lien under the Act of 1875, applicable to the city of New York. The defendant was owner of eight houses in process of construction, and had contracted with plaintiff for mirror frames to be set in the parlor and hall of each house, those in the halls to be arranged to serve the purpose of hat-racks and umbrella-stands. The work having been completed as plaintiff claimed, he presented his bill, and payment being refused, filed the mechanic's lien which is now sought to be foreclosed.

Joseph Fettrech, for appellant.

John L. Miller, for appellee.

FINCH, J.—Had the articles furnished become so attached to the buildings in progress of construction as to justify a lien under the Act of 1875? The language of its first section is, "every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of any building, &c., shall have lien upon the same." Labor upon the building and materials used in its construction are the tests of the lienor's rights. In other words, the work and the materials, both in fact and in intention, must have become part and parcel of the building itself. The inquiry approaches so nearly the doctrine of fixtures as to make the decisions in that respect authoritative, and the necessary guides to our conclusion. If, as between vendor and vendee, the mirror frames in question would have passed by a deed of the real estate, without special enumeration or description, it will follow that they formed part of the house, and were elements in its construction, and so furnished a basis for the lien claimed. The general subject was much discussed in this court in *McRea* v. *Bank*, 66 N. Y. 489. The results arrived at were as precise and definite as the nature of the subject would permit, and must form the basis of our judgment. The question arose between mortgagor and mortgagee, and three requisites were named as the criterion of a fixture. These were, first, actual annexation to the realty or something appurtenant thereto; second, application to the use or purpose to which that part of the realty to which it is connected is appropriated; and, third, the intention of the party making the annexation to make a permanent accession to the freehold. The mirror frames in the present case were actually annexed to the realty, they were so annexed during the process of building, and as part of that process, they were not brought as furniture into the completed house, but themselves formed part of such completion; those in the hall filled up and occupied a gap left in the wainscoting; they were an essential part of the inner surface of the hall, and of a material and construction to correspond with and properly form part of such inner surface, and those in the parlor fitted into a gap purposely left in the baseboard. Both those in the hall and those in the parlor were fastened to the walls with hooks and screws, and they could be removed, but their removal would leave unfinished walls, and require work upon the

house to supply and repair their absence. They were fitted to the use and purpose for which the part of the building they occupied was designed; they formed part of the inner wall, and their construction and finish was made to correspond with the cabinet work of the rooms. In each house they faced each other and formed the most prominent feature of the internal ornamentation. They were intended by the owner to be permanently attached to the buildings, and to go with them when sold as essential parts of the construction. Three of the houses were in fact thus sold. The owner testified as to these frames that he regarded them as "the most attractive portion of the house;" that he stated to the agent of the maker that it was very important to have a few of the frames in immediately, "so that a party who would be desirous of purchasing the house could see these mirrors and hat-racks;" that the agreement with Mr. Evers was that he should go on immediately and put in the frames in two or three of the houses, "so as to be able to show what the houses would be, without delay;" that the kind of work he called this particular work that was to be done, was "cabinet carpentering;" that on one or more occasions he complained of the work not having been done, adding, "and that I could not get my houses ready for market;" and that he was very strenuous about having the frames put up, "because he wished to show the houses to some parties." These facts indicate very plainly the purpose and intention of the owner to permanently attach the frames to the building and make them a part of the structure. It follows that they became parcel of the realty, and as between vendor and vendee would have passed by deed. The recent case of *McKeage* v. *Hanover Fire Ins. Co.*, 81 N. Y. 38, does not conflict with this conclusion. In that case the proof showed that the mirrors "were not set into the walls;" were put up after the house had been built; were capable of being easily detached without interfering with or injuring the walls; and were as much mere furniture as pictures hung in the usual way. The difference between the cases is obvious. We are of opinion, therefore, that the work done by the lienor was work upon the house, and that the materials furnished were used in its construction. The objection that no lien attached cannot be sustained.

Judgment affirmed.

The true criterion of an irremovable fixture is believed to consist in the united application of these three tests:—

1st. Real or constructive annexation of the article in question to the realty.

2d. Appropriation or adaptation to

the use or purpose of that part of the realty with which it is connected.

3d. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made: Ewell on Fixtures 21. The rule is laid down in the leading case of *Teaff* v. *Hewitt*, 1 Ohio St. 530, substantially as above stated, except that actual annexation alone is made a requisite in the first subdivision of the rule, as it is also in the principal case. The rule, as stated in *Teaff* v. *Hewitt*, is approved in *Eaves* v. *Estes*, 10 Kan. 316; *Funk* v. *Brigaldi*, 4 Daly 361; *Potter* v. *Cromwell*, 40 N. Y. 296; *Quinby* v. *Manhattan Cloth Co.*, 24 N. J. Eq. 260; *Potts* v. *N. J. Arms Co.*, 17 Id. 404; *Rogers* v. *Brokaw*, 25 Id. 498; *Edwards* v. *Derrickson*, 28 N. J. Law 56; *Redlon* v. *Barker*, 4 Kan. 451; *Rogers* v. *Crow*, 40 Mo. 96; *Green* v. *Phillips*, 26 Gratt. 759. There can be no doubt, however, as it seems to the writer, that in many cases actual annexation is unnecessary, and that constructive annexation is sufficient to satisfy the requirements of the rule. See the subject considered generally in Ewell on Fixtures 8, *et seq.*, where the cases will be found collected. See, especially, the cases of *Snedeker* v. *Waring*, 12 N. Y. 170; and *D'Eyncourt* v. *Gregory*, L. R., 3 Eq. 382. "Of the three tests above stated, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention:" Ewell on Fixtures 22, where a large number of cases will be found cited in the notes.

Mackie v. *Smith*, 5 La. Ann. 717, was a case very similar in its facts to the principal case. In that case, the mirrors were set in the wall by making recesses therein, which recesses would be left in their rough state if the mirrors were removed. The mirrors were secured in their places by architraves or large wooden frames nailed to plugs of hard wood fastened in the wall, the frames of the mirrors having grooves in them corresponding to tongues in the architraves, and nails driven from one to the other to make the glass more secure. Under art. 459, Rev. C. C., providing that "things which the owner of a tract of land has placed upon it for its service and improvement, are immovable by destination," giving examples, and "that all such movables as the owner has attached permanently to the tenement or to the building are likewise immovable by destination," these mirrors were held to be permanently attached.

So, in *Cave* v. *Cave*, 2 Vern. 508; s. c., 1 Eq. Ca. Abr. 275, it was held that although pictures and glasses, generally speaking, are part of the personal estate, yet if put up instead of wainscot, or where otherwise wainscot would have been, they shall go to the heir, to whom the house ought not to come maimed and disfigured. See, however, *Beck* v. *Rebow*, 1 P. Wms. 94. See further, where mirrors have been in controversy, though not always as between mortgagor and mortgagee, vendor and vendee and executor and heir (in all which relations the same rule as to removal prevails): *Birch* v. *Dawson*, 6 C. & P. 658; s. c. 2 Ad. & E. 37; *Guthrie* v. *Jones*, 108 Mass. 191; *D'Eyncourt* v. *Gregory*, Law Rep., 3 Eq. 382; s. c. 36 L. J. (N. S.) Ch. 107; s. c. 15 W. R. 186.

In the well considered and interesting case of *D'Eyncourt* v. *Gregory*, above cited, where the question arose between one claiming under a tenant for life, and the remainderman, the portrait in oil on

canvas and stretcher was fastened by nails or screws to blocks or plugs of wood inserted in the brick-work of the wall, with a wooden moulding around and in front of the picture, and attached by screws or nails to plugs in the wall. The tapestries in question were each also on wooden stretchers attached to the wall, and had mouldings around them in the same manner as the oil portrait. The carved and gilt frames filled with satin occupied the sides of the rooms, and were attached with nails or screws only, but were used instead of paper as a cover for the walls. The chimney-glass in an ornamental frame, with an oil painting surmounting it, was placed against the flush face of the wall and attached with nails or screws only, as an ordinary looking-glass would be fixed, and could easily be taken down. Lord ROMILLY, M. R., held that the chimney-glass and the ornamental frame and the painting surmounting it, were no part of the house or the wall, but merely ornaments, and hence removable, but that the other articles above described were a part of the house and could not be removed.

In *McKeage* v. *Hanover Fire Ins. Co.*, 16 Hun 239, mantel-mirrors hung on hooks driven into the wall, and pier-mirrors resting on a casing at the bottom and attached to a hold-fast at the top, which was driven into the wall, the cornice being of the design of the mirror-frame and connected with it, were held to be personal property and not covered by a mortgage of the house.

In *Rogers* v. *Crow*, 40 Mo. 91, where, in the erection of a church, a recess was left to receive the organ which was required to complete the architectural design and finish the building, and which was fastened to the platform built to receive it, by nails driven through the outer case into the floor, the wall in the rear of the organ being in a rough and unfinished state and pretty much without ceiling or finish, it was held that the organ was to be considered as annexed to the freehold, and that it passed by a sale of the realty.

A cupboard, however, fitted into a recess and fastened there by nails or screws, has been held to be merely furniture and not to pass with the realty: *Blethen* v. *Towle*, 40 Me. 310. So, marble-slabs placed by the owner in a house belonging to him after its completion, and resting upon, but not fastened to, brackets screwed into the walls, are a part of the furniture of the house, and do not pass with the house to the vendee: *Weston* v. *Weston*, 102 Mass. 514.

It may be stated generally, that mere articles of furniture movable in their nature, though temporarily fastened while in use, do not become a part of the realty nor pass therewith. See Ewell on Fixtures 298, *et seq.*, and cases there cited. See, also, *Kimball* v. *Grand Lodge of Masons*, Supreme Court of Massachusetts, April 1881.

As to the decision in the principal case, it is believed that the cases above cited will show that there can be no reasonable doubt as to its correctness.

MARSHALL D. EWELL.

Chicago.